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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NATALIE D., a Minor, etc., et al.,	
Plaintiffs and Appellants,	G047731
v.	(Super. Ct. No. 30-2010-00434607)
DAN KOUWABUNPAT,	O P I N I O N
Defendant and Respondent.	

Appeal from an order of the Superior Court of Orange County, David T. McEachen, Judge. Motion to strike. Motion to augment and for judicial notice. Order affirmed. Motions to strike, augment and for judicial notice are denied.

Pamela Patterson for Plaintiffs and Appellants.

Carroll, Kelly, Trotter, Franzen & McKenna, Richard D. Carroll, John S. Hinman; Schmid & Voiles and Denise H. Greer for Defendant and Respondent.

* * *

Plaintiffs Natalie D., Christopher N., and Andrew Nelson sued numerous defendants, including Dan Kouwabunpat (defendant), for denying them certain state-funded medical services to which they claimed they were entitled through California Children's Services (CCS). Defendant filed a special motion to strike plaintiffs' first amended complaint (FAC) on the ground it constituted a Strategic Lawsuit Against Public Participation (SLAPP) under Code of Civil Procedure section 425.16 (anti-SLAPP motion; all further undesignated statutory references are to this code). The trial court granted the motion and plaintiffs appeal, asserting that, among other things, defendant failed to show the FAC was based on protected activity. We disagree and affirm the order. Defendant's motion to strike plaintiffs' reply brief or portions of it and the attached exhibits, plus plaintiffs' motion to augment the record and for judicial notice of a recent settlement agreement in a United States District Court, are denied as being unnecessary to our decision.

FACTS AND PROCEDURAL BACKGROUND

According to the FAC, plaintiffs are disabled children and individuals eligible for services under the Robert W. Crown California Children's Services Act (CCS Act). Defendant "is Medical Director of the Medical Therapy Clinic . . . CCS Orange County, pediatrician to [plaintiffs], and charged with ensuring that CCS is providing disabled children in Orange County all medically necessary services, assessments, therapies, [etc.] . . . in compliance with state and federal laws and regulations, as well as the duty of a physician to one's patients." Only the second, fourth, fifth, and sixth causes of action for violation of the CCS Act, intentional and negligent misrepresentation, and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO; 18 U.S.C. § 1961 et seq.) are asserted against defendant.

The second cause of action for violation of the CCS Act alleges that "CCS and those who are paid by CCS, including . . . [defendant], are mandated to provide medically necessary therapy and services to the disabled children residing in Orange County[.] . . . CCS, its employees, and . . . [defendant] intentionally and/or negligently fail to provide needed/effective therapy treatment to . . . 90%[] of the CCS-eligible children in Orange County, and are not providing any therapy treatment to . . . 75%[] of these CCS-eligible children in violation of [CCS]."

The fourth and fifth causes of action for intentional and negligent misrepresentation assert defendant "consistently and knowingly misrepresented to [p]laintiffs their rights under the law to access needed education, therapies and services, since the[] time [p]laintiffs were eligible to receive same from [d]efendant[], despite the fact that at all relevant times . . ., [d]efendant[was] under a duty to provide same and to disclose these facts to [p]laintiffs."

Finally, the sixth cause of action for RICO violations avers that "[d]efendants have conspired amongst themselves to systematically deny services to disabled children in Orange County, and in particular in this case to deny N[atalie] D[.] services that are mandated by [t]he Lanter[]man Act [(Lanterman Act)], and to which . . . she, and other similarly situated children, are so entitled, and as such, [d]efendants . . . are guilty of a pattern of racketeering activity . . . ."

Defendant filed a demurrer and an anti-SLAPP motion. The latter asserted the FAC arose out of an act in furtherance of his right of free speech made before an "official proceeding authorized by law" (§ 425.16, subd. (e)(1), (2)), and that plaintiffs could not establish a probability of prevailing on the merits (*id.*, subd. (b)(1)). The trial court granted the anti-SLAPP motion and deemed the demurrer moot.

DISCUSSION

1. Introduction

Under section 425.16, subdivision (b)(1), a cause of action against a person arising from an act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff establishes the probability of prevailing on the claim. The statute "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

We review the court's ruling de novo, considering "'"the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law."'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

2. Protected Activity

a. Official Proceeding

With regard to the first step of the anti-SLAPP analysis, "the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002)

29 Cal.4th 69, 78.) Under that subdivision, an "'act in furtherance of a person's right of petition or free speech . . .' includes: (1) any written or oral statement or writing made before a[n] . . . official proceeding authorized by law; [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a[n] . . . official proceeding authorized by law . . . ." (§ 425.16, subd. (e)(1), (2).) "These two subparagraphs . . . differ in that subparagraph (1) is limited to oral and written statements and writings actually made in the course of certain specified proceedings, while subparagraph (2) includes statements made 'in connection with' those proceedings." (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198 (*Kibler*).) Where, as here, a defendant bases his anti-SLAPP motion on subparagraphs (1) or (2), he "need not 'separately demonstrate that the statement concerned an issue of public significance.'" (*Ibid*.)

In granting the motion, the court determined defendant's denial of CCS benefits occurred within an "'official proceeding.'" We agree a proceeding under the CCS Act constitutes an "official proceeding" within the meaning of section 425.16, subdivision (e)(1) and (2).

In *Kibler*, the court concluded a peer review proceeding resulting in the summary suspension of a physician constituted an "official proceeding authorized by law" under the anti-SLAPP statute because the process is incorporated within the comprehensive statutory scheme for the licensing of California physicians, "plays a significant role in protecting the public against incompetent, impaired, or negligent physicians," and the outcomes "are subject to judicial review by administrative mandate." (*Kibler*, *supra*, 39 Cal.4th at pp. 199-200; see also *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1396 (*Vergos*) ["[s]tatutory hearing procedures qualify as official proceedings authorized by law for § 425.16 purposes," including procedure for sexual harassment claims established by the Regents of the University of California, "a

constitutional entity having quasi-judicial powers," "'hav[ing] rulemaking and policymaking power in regard to the University'" and whose "'policies and procedures have the force and effect of statute'"].)

Here, the CCS Act sets forth a detailed statutory procedure to "administer a program of services for physically defective or handicapped persons under the age of 21 years, in cooperation with the federal government through its appropriate agency or instrumentality, for the purpose of developing, extending and improving the services." (Health & Saf. Code, § 123805.) Entitlement to services under the CCS Act depends on, among other things, whether the services are "'medically necessary to treat the child's CCS-eligible medical condition.' [Citation.] To be deemed medically necessary, the services must be found to be 'required to meet the medical needs of the client's CCS-eligible medical condition as prescribed, ordered, or requested by a CCS physician *and* which are approved within the scope of benefits provided by the CCS program.' [Citation.] The medical therapy conference determines a client's need for occupational therapy and physical therapy. The determination of medical necessity is based on the client's physical and functional status." (*Natalie D. v. State Dept. of Health Care Services* (2013) 217 Cal.App.4th 1449, 1456 [involving plaintiff Natalie D. in this case].) "[Defendant] is the medical therapy conference doctor who provides medical direction for therapy and determines medical necessity based on a patient's function and rehabilitation potential." (*Ibid*.) The CCS Act includes an administrative process for resolving disputes over services, including the right to appeal and a CCS Fair Hearing if the appeal is denied. (Cal. Code Regs., tit. 22, §§ 42140, 42160, 42180, subd. (a).) A proceeding under the CCS Act thus satisfies the criteria under *Kibler* and *Vergos* for an "official proceeding authorized by law." (§ 425.16, subd. (e)(1), (2).)

Although not addressed by either the trial court or the parties, in our de novo review, we come to the same conclusion with respect to proceedings pursuant to the

purported conspiracy to deny plaintiffs services under Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) alleged in the sixth cause of action. "[T]he Lanterman Act establishes a comprehensive scheme for providing services to people with developmental disabilities." (*Capitol People First v. State Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 682, fn. omitted.) An individual program plan that meets statutory requirements is created for persons with developmental disabilities (*id*. at p. 683), and those dissatisfied with a decision or action may seek resolution "through a voluntary informal meeting or through voluntary mediation before proceeding to an administrative fair hearing" (*Conservatorship of Whitley* (2007) 155 Cal.App.4th 1447, 1460) or proceed directly to the latter, during which they are guaranteed a prehearing exchange of potential witnesses and documentary evidence, the opportunity to present witnesses and evidence, the opportunity to cross-examine all opposing witnesses, the right to appear through counsel or other representatives, a written decision by the hearing officer, and the right to appeal (*id*. at pp. 1460-1461). Proceedings under the Lanterman Act thus qualify as official proceedings for section 425.16 purposes.

b. Arising Out of Protected Activity

The next question is whether defendant's alleged wrongdoing consists of a "written or oral statement or writing made before a[n] . . . official proceeding authorized by law" or "in connection with an issue under consideration or review by" that proceedings. (§ 425.16, subd. (e)(1), (2).) If it does, it would constitute an "'act in furtherance of [his] right of petition or free speech . . . in connection with a public issue'" as defined by that statute. (*Kibler*, *supra*, 39 Cal.4th at p. 198; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) ¶¶ 7.619, p. 7(II)-12 ["Any . . . statement or writing before an official proceeding is *deemed to be* an exercise of the defendant's right of free speech and petition—i.e., 'an act

in furtherance of a person's right of petition and speech'"] & 7.718, p. 7(II)-27 [under section 425.16, subdivision (e)(2), presentation of "a statement or writing to a public body necessarily implicates the rights of free speech"].)

To determine this issue, we examine "the gravamen of the lawsuit" (*Kronemyer v. Internet Movie Database Inc*. (2007) 150 Cal.App.4th 941, 947) to "distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity" (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214-1215), considering "'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89). Because no affidavits were filed in this case, we look solely to the pleadings.

The second cause of action avers defendant violated the CCS Act by "intentionally and/or negligently fail[ing] to provide needed/effective therapy treatment to . . . 90%[] of the CCS-eligible children in Orange County, and . . . not providing any therapy treatment to . . . 75%[] . . . of these CCS-eligible children in violation of the [CCS] Act." Plaintiffs allege defendant is their pediatrician and the "Medical Director of the Medical Therapy Conference" for the CCS program in Orange County, "charged with ensuring that CCS is providing disabled children in Orange County all medically necessary services, assessments, therapies, [etc.] . . . in compliance with state and federal laws and regulations, as well as the duty of a physician to one's patients." Based on plaintiffs' allegations, defendant denied them CCS services while acting in this capacity.

Public officials such as defendant are entitled to protection under the anti-SLAPP statute. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17-18.) And while the FAC does not state whether defendant denied them services in a "written or oral statement or writing made before a[n] . . . official proceeding authorized by law" (§ 425.16, subd. (e)(1)), it implies he did so at the very least "in connection with an issue

under consideration or review by" (§ 425.16, subd. (e)(2)) the Medical Therapy Conference in a proceeding under the CCS Act, an official proceeding authorized by law. (See *Vergos*, *supra*, 146 Cal.App.4th at p. 1397 [hearing officer's decision "meaningless without a communication of the adverse results"].) Thus, defendant's oral or written decision "made in connection with an issue under consideration by an authorized official proceeding . . . constitute[d] protected activity under section 425.16, subdivision (e)(2)." (*Hansen v. Department of Corrections and Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544 (*Hansen*); see also *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assn. of Governments* (2008) 167 Cal.App.4th 1229, 1237-1238 ["It can no longer be questioned that section 425.16 extends to government entities and employees that issue reports and take positions on issues of public interest relating to their official duties"];Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 7:717, p. 7(II)-27 ["statements or conduct . . . made 'in connection with an issue under consideration' by a government body . . . are protected"].)

The fact a vote is involved may not always demonstrate that the defendant's challenged conduct arose from protected activity. (See *Donovan v. Dan Murphy Foundation* (2012) 204 Cal.App.4th 1500, 1508 [section 425.16, subdivision (e)(2) inapplicable where no showing "complaint challenges any statement or writing by a director" made in "an 'official proceeding authorized by law'"]; *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 347 [affirming denial of motion made under section 425.16, subdivision (e)(4) where litigation did not arise out of votes by public officials "but rather from an action taken by the public entity administered by those officials" in requiring additional pension contributions be made].) But here defendant was sued for his purported decision to deny plaintiffs services under the CCS Act, an act of free speech entitled to protection under the anti-SLAPP statute. (See *Schroeder v. Irvine City Council* (2002) 97

Cal.App.4th 174, 183, fn. 3 ["voting is conduct qualifying for the protections afforded by the First Amendment" for anti-SLAPP purposes].)

The same applies to the fourth and fifth causes of action for intentional and negligent misrepresentation of plaintiffs' legal rights to certain services, therapies and education. Given plaintiffs' allegation defendant is the Medical Director of the Medical Therapy Clinic for CCS services in Orange County charged with ensuring disabled children receive "all medically necessary services," any alleged misrepresentations occurred in connection with a proceeding, and arose out of his decision that plaintiffs were not entitled to services, under the CCS Act.

Likewise the sixth cause of action pleads that defendant conspired with others to deny services to disabled children, including services Natalie D. was entitled to under the Lanterman Act, in violation of RICO. Under this allegation, defendant engaged in such conspiracy during proceedings conducted pursuant to the Lanterman Act, another official proceeding authorized by law, and was based on a decision made in connection with an issue under review by that proceeding. As such, all four causes of action against defendant fall within the ambit of the anti-SLAPP statute.

c. Illegal Activity

Plaintiffs maintain the anti-SLAPP statute does not apply because defendant's conduct in denying them therapy and services they were entitled to under the Act was illegal. But "'any "claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case." [Citation.] Plaintiffs' argument "confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has

established a probability of success on the merits."'" (*M.F. Farming Co. v. Couch Distributing Co., Inc.* (2012) 207 Cal.App.4th 180, 196.)

"Where either the defendant concedes, or the evidence *conclusively* establishes, that the allegedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action. [Citation.] However, conduct that would otherwise be protected by the anti-SLAPP statute does not lose its coverage simply because it is *alleged* to have been unlawful. [Citation.] If that were the test, the anti-SLAPP statute would be meaningless." (*Hansen, supra*, 171 Cal.App.4th at p. 1545.) Moreover, for purposes of the anti-SLAPP statute, "the phrase 'illegal' was intended to mean criminal, and not merely violative of a statute." (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654.)

In this case, defendant has not conceded the communication of his denial of therapy and services to plaintiffs was illegal. Plaintiffs allege that to be the case but nothing in the record supports their claim. Moreover, plaintiffs never asserted defendant's conduct was "criminal" as opposed to merely being in violation of a statute. Thus, they have not shown defendant's "protected activity is excluded from anti-SLAPP coverage for indisputably illegal conduct." (*Hansen, supra*, 171 Cal.App.4th at p. 1545.)

Because defendant made a threshold prima facie showing that the causes of action against him were protected under section 425.16, we now turn to whether plaintiffs met their burden to establish a probability of prevailing on their FAC. They did not.

3. Probability of Prevailing

Once a defendant has met its burden to show the complaint alleges acts arising from protected activity, the burden shifts to the plaintiffs to make a prima facie showing of facts which, if proven, would support a judgment in their favor. (*Equilon*

Enterprises v. Consumer Cause, Inc., *supra*, 29 Cal.4th at p. 67.) To satisfy this burden, plaintiffs "cannot rely on the allegations of the complaint alone, but must present admissible evidence." (*Nagel v. Twin Laboratories, Inc*. (2003) 109 Cal.App.4th 39, 45.) Plaintiffs failed to present any, much less admissible, evidence in opposition to defendant's anti-SLAPP motion and thus have not carried their burden to establish their claims had even minimal merit.

DISPOSITION

The order is affirmed. Defendant's motion to strike plaintiffs' reply brief or portions of it and the attached exhibits is denied, as is plaintiffs' motion to augment and for judicial notice of a recent settlement agreement in a United States District Court. Defendant shall recover his costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.